IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-590

THE TELEX CORPORATION, a corporation, and
TELEX COMPUTER PRODUCTS, INC., a corporation,
Petitioners,

v.

BROBECK, PHLEGER & HARRISON, a partnership,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI

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This Reply Brief is being filed by the Petitioners in response to the Brief in Opposition to Petition for Writ of Certiorari. Respondent has raised only two defenses to Petitioners' request for certiorari. These two defenses can be summarily addressed.

I. THE PETITION IS TIMELY

Respondent contends that the Petition for a Writ of Certiorari was not timely filed because Petitioners had failed to timely file their Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

Respondent is in error. The Petition for Rehearing was timely filed and, therefore, the Petition for a Writ of Certiorari is timely.

The judgment of the United States Court of Appeals was rendered on July 5, 1979. Consequently, the last day for timely filing of the Petition for Rehearing was on July 19. (F.R.A.P., Rule 40(a)). Petitioners mailed their Petition for Rehearing to the Court of Appeals on July 19. (See Declaration of Jean Drennen, reprinted as Exhibit A in the Appendix at 1a).[1] Service on Respondent was also effected by mailing on July 19, 1979. (See Affidavit of H. Mathew Moore, with attached executed "Proof of Service by Mail," reprinted as Exhibit B in the Appendix at 2a). Under F.R.A.P., Rule 25(a), it is provided, in pertinent part, that

> "(a) Filing: . . . *briefs and appendices shall be deemed filed on the day of mailing* if the most expeditious form of delivery by mail, excepting special delivery, is utilized." (emphasis added).

The policy of the United States Court of Appeals for the Ninth Circuit is clear: *Petitions for rehearing are treated as briefs and are deemed filed as of the date of mailing:*

> "Please be advised that it is the Court's practice to consider a petition for rehearing filed on the day it is served. While the practice has been established by way of an internal directive, it is also supported by a combined reading of Federal Rules of Appellate Procedure 40, 31 and 25.

[1] The originals of the documents reprinted in the Appendix have been delivered to the Clerk of the United States Supreme Court under separate cover.

> "Rule 40 construes a petition as a brief by way of reference to Rule 31 covering briefs. Rule 25 states that '[b]riefs and appendicies [sic] shall be deemed filed on the day of mailing.'" (Letter of Franco Mancini, Senior Deputy Clerk, Office of the Clerk, United States Court of Appeals for the Ninth Circuit, to Peter C. Bronson, attached as Exhibit A to the Declaration of Peter C. Bronson, reprinted in the Appendix as Exhibit C at 6a).

The Petition for Rehearing, having been mailed to the Court of Appeals on July 19, was timely filed. It was merely a ministerial error that caused the Court of Appeals' docket sheet to read that the Petition for Rehearing was filed on July 23.[2] The Petition for Rehearing was filed as of the date of mailing.[3]

The erroneous nature of Respondent's contention is thus immediately recognizable. Treatment of Petitions for Rehearing as briefs under F.R.A.P. Rule 25(a) is left to the discretion of the Court of Appeals. The Court of Appeals has made the decision to treat Peti-

[2] As is evident from the filing stamps on the cover of the Petition for Rehearing, it was received by the Court of Appeals on July 23, 1979 (a Monday), and accidently marked as filed as of that date. (See Exhibit A to the Affidavit of H. Mathew Moore, Appendix at p. 4a).

[3] Treatment of a petition for rehearing as a brief is supported by F.R.A.P. Rule 40(b), which makes Rules 31(b) and 32(a) relating to briefs, applicable to petitions for rehearing. Furthermore, in similar contexts, courts have treated petitions for rehearing as briefs. See *Combs* v. *Haddock*, 209 Cal. App. 2d 627, 26 Cal. Rptr. 252 (1962); *Heimann* v. *Los Angeles*, 91 Cal. App. 2d 311, 104 P.2d 955 (1949); *Weck* v. *Los Angeles Flood Control Dist.*, 89 Cal. App. 2d 278, 200 P.2d 806 (1948). (Petitions for rehearing briefs for purposes of recovery of printing costs).

tions for Rehearing as briefs. The Petition for a Writ of Certiorari is timely.[4]

II. THE PETITION HAS SUBSTANTIAL MERIT

The Respondent suggests that the Petition for a Writ of Certiorari fails to present serious issues of merit. Respondent's suggestion is untenable. The Petition presents *substantial issues of public importance.* The two issues Petitioners urge are:

> 1. "Whether a federal court, sitting under its diversity jurisdiction, can constitutionally apply the forum state's parol evidence rule to deprive a party of its seventh amendment right to a jury trial on disputed fact issues?"
>
> 2. "Whether a federal court, upon a hearing on a motion for summary judgment under Federal Rule of Civil Procedure 56, can weigh conflicting evidence and resolve disputed issues of fact?"

The two issues present questions of substantial public interest.[5]

---

[4] Even if one were to assume—contrary to a proper reading of the Federal Rules and the actual practice of the Ninth Circuit—that the Petition for Rehearing had not initially been timely filed, the Court of Appeals' actions in having the Petition for Rehearing circulated to the panel, advising the full Court of the suggestion *en banc,* and denying the Petition for Rehearing on the merits conclusively show that the Court of Appeals exercised its power under F.R.A.P. Rule 26(b) to "permit an act to be done after the expiration of such time [the time prescribed by the pertinent rule]." See Order Denying Petition for Rehearing, in Petition for a Writ of Certiorari, at p. 20a.

[5] The Respondent has contended that these issues were not raised below and are therefore not appropriately before this Court. On the contrary, the main issue before the Court of Appeals was the district court's denial of the jury trial to Petitioners by its weighing of conflicting evidence in granting Respondent's motion for summary judgment.

The fact in dispute. The *fact* in dispute is whether Mr. Jatras expressed to Mr. Lasky Petitioners' insistance that Lasky would be entitled to an additional fee only if there were a net recovery. This *fact* is clearly relevant and material. The lower courts *interpreted* the contract "because" the lower courts refused to believe Mr. Jatras's sworn testimony. That *finding of fact* requires a jury under the seventh amendment and at least a non-jury trial under Rule 56. The issue is not *de minimis.* It was solely on the basis of this "finding of fact" that the lower court awarded an attorney a million-dollar fee on a disputed contract that the lawyer himself drafted.

First. The lower courts utilized the California parol evidence rule to deprive Petitioners of their right to a jury trial. In attempting to deflect the Court's attention from the constitutional issue presented in the Petition, Respondent engages in discussion of the niceties of California parol evidence law and the relative roles of judge and jury under the California procedure. That is not the issue. The issue is: *Can a federal court constitutionally apply a forum state's parol evidence rule to deprive a party of his constitutional right to a jury trial?* California's decision in allocating to the court a fact-weighing function is irrelevant. The seventh amendment sets the standards to be followed in the federal courts. One such standard is that it is the jury's function to weigh the evidence. The lower courts clearly weighed the evidence and violated Petitioners' right to a jury trial. In considering the value of Mr. Jatras's testimony, the Court of Appeals stated:

> "Even when we view Jatras's protestations as part of the objective circumstances surrounding the formation of the contract, we find that they do not

make the contract reasonably susceptible to Telex's interpretation, *because Jatras's words are contradicted by his later actions.*

"In reviewing the objective criteria, we rely heavily on the documents reflecting the negotiations between Telex and Brobeck. *These documents more accurately reflect the parties' intent than the hindsight recollections of the parties.* This is particularly true in this case because Jatras had no independent recollection of the negotiations." (Appendix to Petition for a Writ of Certiorari, pp. 14a-15a). (emphasis added).

The lower courts thus clearly engaged in:

1. weighing Mr. Jatras's sworn testimony by his alleged later actions;

2. assigning a greater evidentiary value of certain post-contract documents than to Mr. Jatras's sworn testimony; and

3. impeaching Mr. Jatras's testimony on grounds of no independent recollection of pre-contract "negotiations."

The lower courts violated Petitioners' seventh amendment rights. Petitioners were entitled to a jury trial.

Second. Even if the parol evidence issue were an issue for the court, it remained an issue of *fact* and under F.R.C.P., Rule 56, Petitioners have a right to a non-jury trial on the issue. The lower courts used the summary judgment procedure as a substitute for a non-jury trial. The lower courts used the California standard of "reasonably susceptible" in granting Respondent's motion for summary judgment. This was clear error. In determining whether a fact issue existed under Rule 56, the federal courts must use the standard of "no genuine issue of material fact," a much tougher

standard. Therefore, the fact that a judge decides both the summary judgment and a non-jury trial is not controlling. Important procedural rights occur in a non-jury trial, including the right of cross-examination and demeanor observation. A summary judgment hearing is simply not a substitute for a trial.

CONCLUSION

The Petition for a Writ of Certiorari is timely; it raises substantial questions of public importance; and it should be granted.

Respectfully submitted,

FREDERIC DORWART
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10 East Third Street
Tulsa, Oklahoma 74103

Attorneys for Petitioners

Of Counsel:

HOLLIMAN, LANGHOLZ, RUNNELS & DORWART
Suite 700, Holarud Building
10 East Third Street
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that in accordance with Rule 33(1) of the Revised Rules of the Supreme Court of the United States, three true and correct copies of the foregoing "Reply Brief of Petitioners in Support of a Writ of Certiorari" have been delivered to Brobeck, Phleger & Harrison, One Market Plaza, Spear Street Tower, San Francisco, California 94105, and Moses Lasky, Esq., One Market Plaza, Steuart Street Tower, San Francisco, California 94105, by placing the same in the United States mail with airmail postage prepaid, certified mail, return receipt requested, correctly addressed, on the 21st day of November, 1979.

EXHIBITS

EXHIBIT A

Declaration Re Filing By Mail

I, Jean Drennen, declare:

1. I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of 18 years and not a party to the action entitled *Brobeck, Phleger & Harrison vs. The Telex Coporation;* my business address is 6500 Flotilla Street, Los Angeles, California.

2. On July 19, 1979, I filed Defendants-Appellants' Petition for Rehearing and Suggestion of Appropriateness of a Rehearing In Banc in the above action, No. 77-1419 in the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 25(a) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Local Rules of the Ninth Circuit Court of Appeals, by placing the original and 24 copies of said document enclosed in a sealed envelope with postage fully prepaid, in the United States Post Office mailbox at Los Angeles, California, addressed to the Clerk of the United States Court of Appeals, 7th and Mission Streets, P.O. Box 547, San Francisco, California 94101.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 1979, at Los Angeles, California.

/s/ JEAN DRENNEN
Jean Drennen

EXHIBIT B

Affidavit of H. Mathew Moore

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.

H. MATHEW MOORE, being first duly sworn, deposes and says as follows:

1. I am employed by the law firm of HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK, a Professional Corporation. If called upon to do so, I could competently testify of my own personal knowledge to the facts set forth herein.

2. On November 9, 1979, I inspected the contents of the file for the civil case entitled *Brobeck, Phleger & Harrison* v. *Telex Corp., et al.*, Case No. 77-1419, located at the Office of the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

3. I removed from the file a document entitled "Defendants-Appellants' Petition for Rehearing and Suggestion of Appropriateness of a Rehearing In Banc" (hereafter referred to as "Petition") and requested the Deputy Clerk of Court to certify that the pages attached to this affidavit were true copies of the front and back covers and "Proof of Service by Mail" contained in the Petition. I was informed by the Deputy Clerk that the Clerk's Office would not certify documents filed by parties to actions in the Ninth Circuit Court of Appeals.

4. Thereafter, I made photocopies of the front and back covers and "Proof of Service by Mail" contained in the Petition, which are attached hereto as Exhibit A.

5. The pages contained in Exhibit A are true copies of the above-described portions of the Petition as it appears

on file in the Office of the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit, located in San Francisco, California.

DATED: November 12, 1979.

/s/ H. MATHEW MOORE
H. Mathew Moore

Sworn to and subscribed before me this
12th day of November, 1979.

/s/ BEVERLY H. THOMPSON
Beverly H. Thompson
Notary Public

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1419

BROBECK, PHLEGER & HARRISON, *a partnership,*
Plaintiff and Appellee,
vs.
THE TELEX CORPORATION, a corporation, and TELEX COMPUTER PRODUCTS, INC., a corporation,
Defendants and Appellants.

Appeal From the United States District Court,
Northern District of California.

Defendants-Appellants' Petition for Rehearing
and
Suggestion of Appropriateness of a Rehearing In Banc.

SEVERSON, WERSON, BERKE & MELCHIOR,
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HERMAN F. SELVIN,
PETER C. BRONSON,
450 North Roxbury Drive,
Beverly Hills, Calif. 90210,
(213) 274-8011,

Attorneys for Defendants-Appellants.

Received: Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals, July 23, 1979.

Filed: 7-23-79 *by:* V.T.

Docketed: 7-25-79 *by:* V.T.

Proof Of Service By Mail

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On July 19, 1979, I served the within PETITION FOR REHEARING & SUGGESTION OF APPROPRIATENESS OF A REHEARING IN BANC in re: Brobeck, Phleger & Harrison vs. The Telex Corporation", in the United States Court of Appeals for the Ninth Circuit, No. 77-1419; on the attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, Calif. 94104
Attn: Moses Lasky

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 19, 1979, at Los Angeles, California.

/s/ JEAN DRENNEN
Jean Drennen

Back Cover of Petition for Rehearing

Service of the within and receipt of a copy thereof is hereby admitted this 19th day of July, A.D. 1979.

/s/ Proof of Service Enclosed

EXHIBIT C

Declaration Of Peter C. Bronson

I, Peter C. Bronson, declare:

1. I am an attorney at law duly admitted to practice before the United States Court of Appeals for the Ninth Circuit, and an associate in the law firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin, co-counsel for defendants and appellants in the matter of *Brobeck, Phleger & Harrison* v. *The Telex Corporation, et al.*, Case No. 77-1419 on the docket of said Court.

2. I have personal, first-hand knowledge of the truth of the matters set forth herein, and could and would so testify if called as a witness.

3. Attached hereto as Exhibit A is the original of the letter I received today from Mr. Franco Mancini, Senior Deputy Clerk of the Court of Appeals for the Ninth Circuit. Mr. Mancini's letter confirmed a telephone conversation between him and me on November 8, 1979, in which Mr. Mancini told me that it is the Court's practice to consider as timely filed a petition for rehearing mailed to the Court on the last day for filing. In that conversation, Mr. Mancini told me that the Ninth Circuit considers a petition for rehearing to be a brief for purposes of Rule 25(a) of the Federal Rules of Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 15, 1979, at Beverly Hills, California.

/s/ PETER C. BRONSON
Peter C. Bronson

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

November 13, 1979

Peter Bronson, Esq.
450 North Roxbury
Suite 605
Beverly Hills, CA 90210

Dear Mr. Bronson:

Please be advised that it is the Court's practice to consider a petition for rehearing filed on the day it is served. While the practice has been established by way of an internal directive, it is also supported by a combined reading of Federal Rules of Appellate Procedure 40, 31 and 25.

Rule 40 construes a petition as a brief by way of reference to Rule 31 covering briefs. Rule 25 states that "[b]riefs and appendicies [sic] shall be deemed filed on the day of mailing . . ."

Cordially,

/s/ FRANCO MANCINI
Franco Mancini
Senior Deputy Clerk

FM/bas